

1 KELLOGG, HUBER, HANSEN, TODD,
2 EVANS & FIGEL, P.L.L.C.
3 Michael K. Kellogg (*pro hac vice*)
Mark C. Hansen (*pro hac vice*)
Email: mkellogg@khhte.com
mhansen@khhte.com
4 1615 M Street, N.W., Suite 400
Washington, D.C. 20036
5 Telephone: (202) 326-7900
Facsimile: (202) 326-7999

6 CROWELL & MORING LLP
7 Douglas W. Sullivan (SB No. 0088136)
275 Battery Street, 23rd Floor
8 San Francisco, CA 94111
Telephone: (415) 986-2800
9 Facsimile: (415) 986-2827

10 Attorneys for Defendant
AT&T MOBILITY, LLC

11

12 UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 San Francisco Division

15 FEDERAL TRADE COMMISSION,

Case No. 14-CV-04785-EMC

16 Plaintiff,

MOTION TO DISMISS BY DEFENDANT
AT&T MOBILITY, LLC

17 v.

Hearing Date: March 12, 2015
Time: 1:30 p.m.
Judge: Hon. Edward M. Chen

18 AT&T MOBILITY LLC, a limited liability
company,

19 Defendant.

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NOTICE OF MOTION AND STATEMENT OF RELIEF SOUGHT

TO ALL PARTIES AND THEIR COUNSEL OF RECORD: Please take notice that AT&T Mobility, LLC (“AT&T”) hereby files this motion to dismiss the Federal Trade Commission’s (“FTC”) complaint. The motion will be heard on Thursday, March 12, 2015, at 1:30 p.m., before the Honorable Edward M. Chen.

Defendant AT&T seeks dismissal of the FTC's complaint.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE ISSUE

Whether this Court possesses subject-matter jurisdiction over the FTC's complaint, notwithstanding the fact that 15 U.S.C. § 45(a)(2) deprives the FTC of regulatory jurisdiction over "common carriers subject to the Acts to regulate commerce."

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(b)(1), AT&T respectfully requests that the Court dismiss the complaint because the FTC lacks authority to bring suit against AT&T. Section 5 of the Federal Trade Commission Act of 1914 (“FTC Act”) exempts from the Act’s coverage all “common carriers subject to” the Communications Act of 1934 (“Communications Act”), 47 U.S.C. § 151 *et seq.* See 15 U.S.C. § 45(a)(2); *id.* § 44. This “common-carrier exemption” is designed to ensure that entities already subject to another agency’s regulatory authority will not face potentially inconsistent regulation under the more general terms of the FTC Act. AT&T is a “common carrier[] subject to” the Communications Act because it offers its mobile voice plans to customers on an indiscriminate basis without modifying the content of the information that traverses its network. See 47 U.S.C. §§ 153(11), 332(c)(1). Accordingly, AT&T is not subject to the FTC’s enforcement authority under Section 5.

Despite AT&T's status as a common carrier, the FTC has asserted jurisdiction on the ground that the exemption does not apply to AT&T's mobile *data* services, which are not treated as common carriage. This interpretation of the statute, however, is incorrect. As various courts have held, and as the text, structure, and history of the FTC Act make clear, the relevant exemption

in Section 5 focuses on the *status* of the regulated entity, not the particular activity in which it is engaged. *See, e.g., FTC v. Miller*, 549 F.2d 452, 455 (7th Cir. 1977). Indeed, the FTC itself has recognized that, as drafted, the exemption altogether removes common carriers such as AT&T from its jurisdiction and has asked Congress to modify the statute. So far, Congress has refused.

In any event, the mobile data activities that the FTC is seeking to regulate are already subject to regulation by the Federal Communications Commission (“FCC”). At issue here is AT&T’s “maximum bit rate” (“MBR”) program, which is sometimes known as “throttling” because it temporarily reduces the speed of mobile data consumption after users reach certain monthly thresholds. AT&T implemented this network management program to preserve a high-quality experience for all of its customers, by preventing heavy users of data from overwhelming the mobile network and degrading service for all. It did so after the FCC identified throttling as a type of network management that may be implemented consistent with the FCC’s Open Internet principles and rules. *See Open Internet Order*¹ ¶ 73. The FCC also imposed a transparency rule, which requires providers of mobile broadband services to make certain public disclosures of their network management practices, including throttling. *See id.* ¶¶ 53, 97.

Last summer, in a letter from its Chairman, the FCC sought from AT&T an explanation of how AT&T's MBR program complies with the FCC's Open Internet rules.² Thereafter, the FCC sent a more detailed Letter of Inquiry to AT&T about its MBR program, to which AT&T provided

¹ Report and Order, *Preserving the Open Internet*, 25 FCC Rcd 17905, ¶ 73 (2010) (“*Open Internet Order*”) (“For example, during periods of congestion a broadband provider could provide more bandwidth to subscribers that have used the network less over some preceding period of time than to heavier users.”), vacated in part on other grounds, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

² Letter from Tom Wheeler, Chairman, FCC, to Ralph de la Vega, President and CEO, AT&T Mobility (Aug. 6, 2014), attached hereto as Exhibit 1. Similar letters were sent to the other three major wireless carriers regarding comparable programs at those firms. *See Letters to Big Four Wireless Carriers Probe Intersection of Business, Engineering Practices, FCC Says*, Comm. Daily (Aug. 12, 2014). AT&T responded to Chairman Wheeler's letter on September 5, 2014. *See Letter from Robert W. Quinn, Senior Vice President, Federal Regulatory, AT&T, to Tom Wheeler, Chairman, FCC* [hereinafter Quinn Letter], attached hereto as Exhibit 2.

1 an extensive response.³ The FCC's Enforcement Bureau is now actively considering whether to
 2 issue a Notice of Apparent Liability against AT&T alleging that AT&T's public disclosures of its
 3 MBR program failed to satisfy the FCC's transparency rule and proposing statutory forfeitures.

4 The FTC seeks to litigate the very same issues in an inappropriate parallel proceeding. It
 5 asserts in this lawsuit that AT&T's imposition of MBR was unfair and that its disclosures were
 6 inadequate. But whether AT&T's network management program is "unfair" and whether its
 7 disclosures were "inadequate" are issues for the FCC to decide, and in fact the FCC is in the
 8 process of so deciding, just as Congress intended. Congress drafted Section 5 to avoid subjecting
 9 common carriers like AT&T to precisely this sort of conflicting authority of separate federal
 10 agencies over the same conduct. Applying the exemption in this case is thus particularly
 11 appropriate because the FTC's assertion of jurisdiction would contravene the essential purpose of
 12 the exemption – to avoid overlapping regulatory jurisdiction.

13 **FACTUAL BACKGROUND**

14 **A. AT&T's MBR Program**

15 AT&T is a retail provider of mobile telephone service that offers "the largest digital voice
 16 and data network in America." Compl. ¶ 9 & Ex. A-1. AT&T's mobile wireless customers may
 17 select voice service alone, or both voice and data service in a single plan. *See id.*, Ex. A-2.
 18 Customers who subscribe to AT&T's data services may browse the Internet, send and receive
 19 email, and utilize various other applications by using their smartphones to access AT&T's
 20 wireless network. *See id.* ¶ 9 & Ex. A-1. From 2007 to 2010, in conjunction with its voice
 21 service, AT&T offered service plans that allowed its wireless customers to use unlimited data for a
 22 fixed monthly price. *See id.* ¶ 10 & Ex. A-1. In all of its customer contracts, however, AT&T
 23 reserved the right to limit or terminate wireless service if a customer's use "adversely impacts

24
 25
 26
 27 ³ Letter from Theresa Z. Cavanaugh, Chief, Investigations and Hearings Div., Enforcement
 Bureau, FCC, to Jackie Flemming, AT&T (Oct. 28, 2014) [hereinafter Letter of Inquiry], attached
 28 hereto as Exhibit 3.

1 [AT&T's] wireless network," and to "protect its wireless network from harm," even where those
 2 protective steps "may impact legitimate data flows."⁴

3 Following the introduction of the iPhone – and particularly following the launch of the
 4 iPhone 3G in 2008 – data consumption on AT&T's mobile network exploded. Basic broadband
 5 transmissions such as corporate email were replaced by new "apps" that enabled rich web
 6 browsing, turn-by-turn navigation, and streaming video. This revolution caused data usage on
 7 AT&T's network to increase *20,000 percent* between 2007 and 2011. Quinn Letter at 2. In the
 8 face of this overwhelming growth, AT&T discontinued its Unlimited Data plans in June 2010 for
 9 new customers, but offered to grandfather existing customers so that they could continue their
 10 Unlimited Data plans going forward. *See Compl. ¶¶ 11-12.*

11 Even after AT&T discontinued Unlimited Data plans prospectively, a small percentage of
 12 grandfathered Unlimited Data plan customers continued to consume a disproportionate amount of
 13 capacity on AT&T's network. To address this ongoing resource challenge, AT&T announced its
 14 MBR program in a July 2011 press release and implemented it three months later. *See id. ¶ 15;*
 15 *Press Release, AT&T, An Update for our Smartphone Customers with Unlimited Data Plans (July*
 16 *29, 2011), available at* [*http://www.att.com/gen/press-room?pid=20535&cdvn=news&*](http://www.att.com/gen/press-room?pid=20535&cdvn=news&newsarticleid=32318)
 17 *newsarticleid=32318.* At first, AT&T temporarily reduced download speeds for those Unlimited
 18 Data plan customers whose data consumption placed them in the top 5 percent of data-usage
 19 customers in a given month. *See Compl. ¶¶ 15-16, 35.* In March 2012, AT&T modified the
 20 program to reduce download speeds for any Unlimited Data plan customer whose data
 21 consumption exceeded a fixed monthly threshold, and announced this change to its customers.
 22 *See id. ¶ 17.* And, as of late June 2014, AT&T further refined the program for customers on its
 23 third-generation network so that download speeds would be reduced for the heavy data users only

24 ⁴ June 2007 Terms and Conditions; March 2008 Terms and Conditions; September 2010
 25 Wireless Customer Agreement ("WCA"), § 6.2; *see also, e.g.*, June 2007 Terms and Conditions
 26 (reserving the right to "limit throughput or amount of data transferred"); March 2008 Terms and
 27 Conditions (reserving the right to "modify" or "disconnect" service of users "whose usage adversely
 28 impacts [AT&T's] wireless network including . . . after sessions of excessive usage"); August 2012
 WCA § 6.2 (stating that "AT&T may engage in any reasonable network management practice . . . to
 reduce network congestion," including the reduction of data throughput speeds).

1 where such usage occurs in a congested area. Quinn Letter at 4. Once a customer leaves the area,
 2 or the congestion subsides, the customer's experience returns to normal.

3 **B. AT&T's Common-Carrier Status**

4 At all relevant times, AT&T generally, and its network management and disclosure
 5 practices specifically, have been subject to regulation by the FCC, the regulatory agency created
 6 by the Communications Act of 1934 to "regulat[e] interstate and foreign commerce in
 7 communication by wire and radio." 47 U.S.C. § 151. The Communications Act includes
 8 provisions – collected in Title II – that are specifically applicable to "common carriers." *See*
 9 *generally id.* § 201 *et seq.*⁵ Because AT&T is a provider of "commercial mobile service," the
 10 Communications Act treats AT&T as a common carrier. *See id.* § 332(c)(1). The FCC reached
 11 that conclusion explicitly in the *Broadband Classification Order*,⁶ stating that a provider of
 12 "traditional mobile voice service . . . is to be treated as a common carrier for the
 13 telecommunications services it provides." *Broadband Classification Order* ¶ 50; *see also Cellco*
 14 *P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012) ("mobile-voice providers are considered
 15 common carriers") (emphasis omitted); *Roaming Obligations Order*⁷ ¶ 1 ("clarify[ing]" the
 16 "common carrier obligation[s]" of mobile voice service providers).

17 The FCC classified mobile *data* services in the same order as "private mobile services,"
 18 which are not subject to common-carrier services treatment under Title II of the Act. *See*
 19 *Broadband Classification Order* ¶¶ 37-41 (citing § 332). But the FCC has nonetheless asserted
 20 "plenary authority" over wireless data providers under Title III of the Act, which governs wireless
 21 services generally. Br. for Appellee/Respondents at 20, 44, *Verizon v. FCC*, No. 11-1355, 2012

22 ⁵ The Communications Act defines a "common carrier" as "any person engaged as a
 23 common carrier for hire, in interstate or foreign communication by wire or radio or interstate or
 24 foreign radio transmission of energy, except where reference is made to common carriers not
 subject to this chapter." 47 U.S.C. § 153(11).

25 ⁶ Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the*
 26 *Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007) ("Broadband Classification Order").

27 ⁷ Report and Order and Further Notice of Proposed Rulemaking, *Reexamination of Roaming*
 28 *Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817 (2007) ("Roaming
 Obligations Order").

1 WL 3962421 (D.C. Cir. filed Sept. 10, 2012). Section 706 of the Telecommunications Act of
 2 1996 provides the FCC with the additional regulatory authority to promote advanced
 3 telecommunications capability, including wireless data. *See* 47 U.S.C. § 1302; *Verizon v. FCC*,
 4 740 F.3d 623, 636-42 (D.C. Cir. 2014).

5 The FCC's Open Internet regulations governing mobile data services were adopted in
 6 2010, and applied, *inter alia*, to network management practices aimed at "reducing or mitigating
 7 the effects of congestion on the network." *Open Internet Order* ¶ 82. In the *Open Internet Order*,
 8 the FCC established an anti-blocking rule that precluded AT&T and other mobile carriers from
 9 preventing their customers from accessing lawful websites on their mobile devices and from
 10 blocking certain applications that compete with their own services.⁸ At the same time, the FCC
 11 established a regime of "reasonable" and flexible network management that allowed AT&T and
 12 other carriers to manage their networks so as to avoid network congestion resulting from excessive
 13 data usage:

- 14 • The FCC recognized the need for "reasonable network management" programs because
 15 "existing mobile networks present operational constraints that fixed broadband networks do
 not typically encounter." *Open Internet Order* ¶ 95.
- 16 • The FCC concluded that "congestion management may be a legitimate network
 17 management purpose" and that "broadband providers may need to take reasonable steps to
 ensure that heavy users do not crowd out others." *Id.* ¶ 91.
- 18 • The FCC found that a wireless carrier's efforts "to . . . reduce or mitigate the effects of
 19 congestion on its network or to address quality-of-service concerns" are reasonable
 practices. *Id.* ¶ 81.
- 20 • The FCC approved the network management policy of providing "more bandwidth to
 21 subscribers that have used the network less over some preceding period of time than to
 heavier users" to reduce congestion. *Id.* ¶ 73.

22 The *Open Internet Order* also imposed transparency and disclosure regulations "applicable
 23 to all mobile broadband providers" designed to "ensur[e] that end users have sufficient
 24 information to make informed choices regarding use of the network." *Id.* ¶ 97; *see id.* ¶ 53
 25 (requiring "[e]ffective disclosure of broadband providers' network management practices and the
 26 performance and commercial terms of their services," for both wireline and wireless access to the

27 ⁸ *See* 47 C.F.R. § 8.5 (2013).
 28

1 Internet). The FCC's rule thus allowed certain specific network management techniques while
 2 also imposing disclosure requirements.⁹ The *Open Internet Order* provides further specificity:

- 3 • Mobile broadband providers must "clearly explain their criteria for any restrictions on use of
 4 their network[s]," including any "congestion management practices," the "types of traffic
 5 subject to practices," the "purposes served by [those] practices," the "criteria used in [those]
 6 practices, such as indicators of congestion that trigger a practice," the "usage limits and
 7 consequences of exceeding them," and "references to engineering standards, where
 8 appropriate." *Open Internet Order* ¶¶ 56, 98.
- 9 • Mobile broadband providers must "prominently display or provide links to disclosures on a
 10 publicly available, easily accessible website that is available to current and prospective end
 11 users." *Id.* ¶ 57.
- 12 • Any "relevant information" regarding broadband providers' network management practices
 13 – including congestion management practices – must be disclosed "at the point of sale." *Id.*

10 In its ruling on the FCC's *Open Internet Order*, the D.C. Circuit upheld the FCC's authority to
 11 impose network management rules on broadband data services under Section 706, left undisturbed
 12 the FCC's finding that MBR-type programs constitute reasonable network management, and
 13 upheld the FCC's transparency rule – the very issues that, as discussed below, the FTC is seeking
 14 to regulate here. *See Verizon v. FCC*, 740 F.3d at 637, 659. The anti-blocking rule was vacated.
 15 *Id.* at 659.

16 In November 2011, concurrent with its implementation of MBR, AT&T complied with the
 17 FCC's notice requirements by setting forth on its website the mandated disclosures concerning its
 18 network management practices for mobile data. *See Open Internet Order* ¶ 57.¹⁰ And AT&T took
 19 the further step of disclosing its congestion management practices to Unlimited Data plan
 20 customers through a second webpage devoted to explaining its MBR program.¹¹

21

 22 ⁹ The FCC's rule states that "[a] person engaged in the provision of broadband Internet
 23 access service shall publicly disclose accurate information regarding the network management
 24 practices, performance and commercial terms of its broadband Internet access services sufficient for
 25 consumers to make informed choices." 47 C.F.R. § 8.3.

26 ¹⁰ *See, e.g.*, AT&T, Broadband Information – Information About the Network Practices,
 27 Performance Characteristics & Commercial Terms of AT&T's Mass Market Broadband Internet
 28 Access Services, <http://www.att.com/broadbandinfo> (describing AT&T's "Network Practices" with
 respect to wired and mobile services, including its "process to reduce the data throughput speed
 experienced by a very small minority of smartphone customers who are on unlimited plans").

29 ¹¹ AT&T, Info for Smartphone Customers with Unlimited Data Plans,
 30 <http://www.att.com/datainfo>.

1 **C. The FCC's MBR Inquiry**

2 On August 6, 2014, the Chairman of the FCC sent a letter to the President of AT&T
 3 Mobility asking about AT&T's MBR program. The Chairman listed two issues for which he
 4 wanted responses. First, he asked for the rationale for treating customers differently in terms of
 5 speed reductions based on the plan to which they subscribe, and whether that treatment was
 6 consistent with the FCC's network management rules. Second, he wanted an explanation of
 7 whether the MBR program complies with the transparency requirements of the Open Internet
 8 rules. The other three major wireless carriers received similar letters.¹² AT&T sent a detailed
 9 response to the Chairman's letter on September 5, 2014.¹³

10 Thereafter, on October 28, 2014, the Chief of the Investigations and Hearings Division of
 11 the FCC's Enforcement Bureau sent an official Letter of Inquiry to AT&T requesting extensive
 12 documents and detailed information about AT&T's MBR program. The stated purpose of the
 13 inquiry was to determine whether the MBR program "may have violated" the Commission's Open
 14 Internet rules, including the public-disclosure requirements pertaining to network management
 15 practices. Letter of Inquiry at 1. AT&T provided the documents and a detailed response to the
 16 questions on November 10, 2014, and, as noted, the FCC is now actively considering issuing a
 17 Notice of Apparent Liability against, and seeking a statutory forfeiture from, AT&T.

18 **D. The FTC Complaint**

19 On the same day that the FCC issued its Letter of Inquiry to AT&T, the FTC filed suit
 20 against AT&T based on its MBR program. The complaint sets forth two counts under Section 5
 21 of the FTC Act, 15 U.S.C. § 45. The first count – for "Unfair Mobile Data Throttling Program" –
 22 asserts that, notwithstanding "mobile data contracts that were advertised as providing access to
 23 unlimited mobile data," AT&T "imposed significant data speed restrictions on customers who
 24 used more than a fixed amount of data in a given billing cycle." Compl. ¶¶ 45-46. The second
 25 count, entitled "Deceptive Failure to Disclose Mobile Data Throttling Program," asserts that

26

¹² *See supra* note 2.

27 ¹³ *See* Quinn Letter.

1 AT&T has “represented, directly or indirectly, expressly or by implication,” that “the amount of
 2 data that [unlimited data customers] could access in any billing period would not be limited,” and
 3 that, “[s]ince August 2011, Defendant has failed to disclose, or has failed to disclose adequately,
 4 that it imposes significant and material data speed restrictions on unlimited mobile data plan
 5 customers who use more than a fixed amount of data in a given billing cycle.” *Id.* ¶¶ 48-49. The
 6 complaint claims subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345,
 7 and 15 U.S.C. §§ 45(a) and 53(b). *Id.* ¶ 2.

8 ARGUMENT

9 **I. AT&T Is Exempt from Section 5 of the FTC Act Because It Is a Common 10 Carrier Subject to the Communications Act**

11 The FTC lacks jurisdiction to prosecute this action because AT&T is a common carrier
 12 subject to the Communications Act and therefore outside the FTC’s authority under Section 5 of
 13 the FTC Act. 15 U.S.C. § 45(a)(2). Section 45(a)(2) states:

14 The [FTC] is hereby empowered and directed to prevent persons, partnerships, or
 15 corporations, except banks, savings and loan institutions described in section
 16 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this
 17 title, common carriers subject to the Acts to regulate commerce, air carriers and
 18 foreign air carriers subject to part A of subtitle VII of title 49, and persons,
 partnerships, or corporations insofar as they are subject to the Packers and
 Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in
 section 406(b) of said Act [7 U.S.C. 227 (b)], from using unfair methods of
 competition in or affecting commerce and unfair or deceptive acts or practices in or
 affecting commerce.

19 *Id.* (emphases added; first set of brackets added). The FTC Act specifically defines “‘Acts to
 20 regulate commerce’” to include “the Communications Act of 1934 [47 U.S.C. § 151 *et seq.*] and
 21 all Acts amendatory thereof and supplementary thereto.” 15 U.S.C. § 44. AT&T plainly qualifies
 22 as a “common carrier” for purposes of Section 5 because it provides mobile voice services subject
 23 to common-carrier regulation under Title II of the Communications Act.

24 The fact that AT&T’s mobile *data* services are not regulated as common-carrier services
 25 under the Communications Act is irrelevant. The text, structure, history, and purpose of Section 5
 26 leave no doubt that its common-carrier exemption turns on an entity’s “*status* as a common carrier

1 subject to [an Act to regulate commerce],” not its “*activities* subject to regulation under that Act.”
 2 *FTC v. Miller*, 549 F.2d 452, 455 (7th Cir. 1977) (emphases added).

3 Thus, Section 5 defines the FTC’s jurisdiction in terms of specific entities – namely,
 4 “persons, partnerships, or corporations.” 15 U.S.C. § 45(a)(2). Among such “persons . . . or
 5 corporations,” Congress exempted “banks, savings and loan institutions described in Section
 6 57a(f)(3) of this title,” “Federal credit unions described in section 57a(f)(4) of this title,”
 7 “common carriers subject to the Acts to regulate commerce,” and “air carriers and foreign air
 8 carriers subject to part A of subtitle VII of title 49.” And Congress crafted this exemption without
 9 reference to the activities in which these entities engage. *Id.* The common-carrier exemption by
 10 its terms thus exempts entities, not just certain activities engaged in by those entities, from the
 11 coverage of the FTC Act.

12 The legislative history of the amendments to Section 5 underscores this point. After
 13 Congress passed the Communications Act in 1934, it amended the FTC Act in 1938, expressly to
 14 exempt common carriers subject to the Communications Act. *See Wheeler-Lea Act*, Pub. L. No.
 15 75-447, § 3, 52 Stat. 111, 111 (1938). In deliberations preceding the amendment, Congress
 16 contemplated – *but did not adopt* – statutory language providing “that common carriers under the
 17 [Communications] [A]ct are excepted as common carriers under [the FTC] [A]ct *only in respect of*
 18 *their common-carrier operations.*” *To Amend the Federal Trade Commission Act: Hearing on*
 19 *H.R. 3143 Before the H. Comm. on Interstate and Foreign Commerce*, 75th Cong. 23, 25 (1937)
 20 [hereinafter *Hearing Tr.*] (emphasis added). The purpose of that proposal was to qualify that,
 21 “where common carriers engage in activities that are not in the common carrier field, beyond the
 22 field that the Government is regulating, then and in that case, they are subject to the jurisdiction of
 23 the Federal Trade Commission.” *Id.* at 26. But that text was not incorporated into the final
 24 version of the law. Instead, Congress adopted the language we have today, which flatly exempts
 25 common carriers from the FTC’s jurisdiction on an entity-by-entity basis.

26 This interpretation is further confirmed by contrasting the common-carrier exemption with
 27 the language and history of Section 5’s exemption related to the Packers and Stockyards Act.
 28

1 When Congress amended the FTC Act in 1938, Section 5 also exempted “persons, partnerships, or
 2 corporations subject to the Packers and Stockyards Act.” Wheeler-Lea Act § 3. But, in 1958,
 3 Congress amended that clause to exempt companies only “*insofar as they are subject to* the
 4 Packers and Stockyards Act,” thus preserving FTC enforcement authority with respect to activities
 5 that are *not* subject to the Packers and Stockyards Act – even if the company engaging in those
 6 activities *is*, at other times, subject to that Act. Pub. L. No. 85-909, § 3, 72 Stat. 1749, 1750
 7 (1958) (codified as amended at 15 U.S.C. § 45(a)(2)) (emphasis added). Contrasting the amended
 8 activity-specific language of the Packers and Stockyards Act exemption with the status-linked
 9 language of the common-carrier exemption (and the original Packers and Stockyards exemption)
 10 shows that Congress made a deliberate choice to treat the two exemptions differently. “[W]hen
 11 the legislature uses certain language in one part of the statute and different language in another,
 12 [courts] assume[] different meanings were intended.” *Sosa v. Alvarez-Machain*, 542 U.S. 692,
 13 711 n.9 (2004) (internal quotation marks omitted).

14 The presumption of different meanings has particular force here. By literally replacing a
 15 status-based exemption for entities subject to the Packers and Stockyards Act with an activity-
 16 based exemption twenty years later, Congress made inescapably clear that it distinguishes between
 17 the two. *Cf. United States v. Stevenson*, 215 U.S. 190, 198 (1909) (“It is not to be presumed that
 18 this change is meaningless, and that Congress had no purpose in making it.”). Congress
 19 understood that the first incarnation of the Packers and Stockyards Act exemption – and thus the
 20 enduring language of the common-carrier exemption – created an entity-by-entity exemption. *See*
 21 H.R. Rep. No. 85-1048, at 6 (1957). Congress easily could have drafted (or amended) the
 22 common-carrier exemption to apply only to common carriers “*insofar as they are engaged in*
 23 common carriage subject to the Acts to regulate commerce.” Indeed, as noted, Congress had before
 24 it a proposal to exempt common carriers “only in respect of their common carrier operations.”
 25 *Hearing Tr.* 23, 25. But Congress did not adopt that language, indicating “that the legislature
 26 [did] not intend the bill to include the provisions embodied in the rejected amendment.” 2A
 27 Norman J. Singer, *Statutes and Statutory Construction* § 48:18 (7th ed. 2013); *see Russello v.*
 28

1 *United States*, 464 U.S. 16, 23-24 (1983) (“Where Congress includes limiting language in an
 2 earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was
 3 not intended.”).

4 By adopting a status-based exemption, Congress “demonstrated its adherence to its
 5 traditional policy of dividing regulatory responsibilities along industry lines, rather than, as the
 6 FTC suggests, on the basis of particular activities.” *Miller*, 549 F.2d at 459. The enactment of the
 7 Communications Act in 1934 – 20 years after the 1914 FTC Act – reflected Congress’s
 8 determination that “a more effective execution” of national communications policy would best be
 9 served “by centralizing authority heretofore granted by law to several agencies.” 47 U.S.C. § 151.
 10 “The [FCC] was expected to serve as the single Government agency with uniform jurisdiction and
 11 regulatory power over all forms of electrical communication, whether by telephone, telegraph,
 12 cable, or radio.” *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968) (internal
 13 quotation marks and footnotes omitted). The purpose of the “common-carrier exemption” is thus to
 14 “prevent[] interagency conflict” that would arise if the FTC regulated industries that are already
 15 subject to the authority of specialized agencies such as the FCC. *FTC v. Verity Int’l, Ltd.*, 443
 16 F.3d 48, 57 (2d Cir. 2006) (“*Verity II*”); *see also Miller*, 549 F.2d at 457.

17 **II. The Case Law Is Consistent on the Meaning of the Exemption**

18 In the 100 years of the FTC’s existence, no court has authorized the FTC to assert
 19 jurisdiction over a common carrier. Thus, in *FTC v. Miller*, the Seventh Circuit rejected the
 20 FTC’s argument that, for purposes of the jurisdictional exemption, the relevant inquiry is whether
 21 “the particular activity in question” is subject to regulation by the other agency. 549 F.2d at 457.
 22 Instead, the court recognized that, in the case of a company engaged in the business of transporting
 23 mobile homes and subject to regulation as a common carrier under the Interstate Commerce Act,
 24 “the words of the [FTC] Act plainly exempt from the [FTC’s] investigatory jurisdiction any
 25 corporation *holding the status of a common carrier* regulated by the [Interstate Commerce
 26 Commission (‘ICC’)].” *Id.* at 456-57 (emphasis added). The court accordingly rejected the FTC’s
 27
 28

1 attempt to assert jurisdiction over advertising activities that it argued fell outside the scope of ICC
 2 regulation.¹⁴

3 The FTC itself has not hesitated to advance this status-based argument when doing so
 4 leads to an *expansion* of its jurisdiction. For example, the FTC successfully argued that a non-
 5 common carrier engaged in common carrier-like activities is not entitled to the benefit of the
 6 jurisdictional exemption; what matters is the *status* of the company in question, not the activities it
 7 performs. *See Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 923 (2d Cir. 1980) (“[I]t is of no
 8 significance that the publishing of airline schedules is an activity affecting competition among air
 9 carriers subject to the Federal Aviation Act. Since Donnelley is not itself an air carrier, it is not
 10 beyond the [FTC’s] jurisdiction.”); *FTC v. American Standard Credit Sys., Inc.*, 874 F. Supp.
 11 1080, 1086 (C.D. Cal. 1994) (finding that alleged agent of bank, despite engaging in banking
 12 activities, did not fit Section 5’s exemption because it lacked the status of “banks, savings and
 13 loan institutions”); *National Fed’n of Blind v. FTC*, 303 F. Supp. 2d 707, 714-15 (D. Md. 2004)
 14 (telefunders can be regulated by the FTC, “regardless of the fact that they engage in the same
 15 activities as the nonprofits [which are outside of the FTC’s jurisdiction],” because “[c]ourts have
 16 held that an entity’s exemption from FTC jurisdiction is based on that entity’s *status*, not its
 17 activity”), *aff’d*, 420 F.3d 331 (4th Cir. 2005); *FTC v. CompuCredit Corp.*, No. 1:08-CV-1976-
 18 BBM-RGV, 2008 WL 8762850, at *1, *3-4 (N.D. Ga. Oct. 8, 2008) (finding that non-bank which
 19 “perform[ed] contractual services for banks” such as “market[ing] subprime credit cards to
 20 consumers” was not subject to Section 5’s exemption of “banks, savings and loan institutions,”
 21 and endorsing the FTC’s argument that “the exemptions in § 45(a)(2) are focused on the status of
 22 the entity claiming exemption and not the activities of the entity”); *cf. FTC v. Saja*, No. Civ-97-
 23 0666-PHX-SMM, 1997 WL 703399, at *2 (D. Ariz. Oct. 7, 1997) (finding that “Defendants’

24 _____
 25 ¹⁴ In *Miller*, the FTC did not contend that the advertising activities of the company in
 26 question were non-common-carrier activities. Rather, the FTC argued that these activities were
 27 simply not ones that the ICC would regulate and so the purpose of the exemption – to avoid
 28 interagency conflict – was not implicated. But, in rejecting this argument, the court emphasized
 that it was the *status* of the company as a common carrier subject to the ICC’s regulation – not the
 particular nature of the activities in question – that mattered for purposes of applying the exemption.
 No court of appeals has ever held otherwise.

1 status, in part, as fundraisers for not-for-profit organization[s] does not create not-for-profit status”
 2 for purposes of the exemption). The FTC has even *held*, in an administrative proceeding, that
 3 “Section 5(a)(2) specifically lists *categories of businesses* whose acts and practices are not subject
 4 to the Commission’s authority under the FTC Act.” Order, *LabMD, Inc.*, No. 9357, 2014 WL
 5 253518, at *10 (F.T.C. Jan. 16, 2014) (emphasis added).

6 The only case even arguably supporting a contrary reading of Section 5 is the district
 7 court’s decision in *FTC v. Verity International, Ltd.*, 194 F. Supp. 2d 270 (S.D.N.Y. 2002)
 8 (“*Verity I*”). The court there stated that the common-carrier exemption “depends on the particular
 9 activity at issue,” rather than on the “status” of the entity. *Id.* at 275-76. No other court has
 10 endorsed such a misreading of Section 5, and the Second Circuit declined to affirm on the same
 11 basis as the district court, finding instead that the defendant was not a common carrier at all. *See*
 12 *Verity II*, 443 F.3d at 58-60. Indeed, the Solicitor General, on behalf of the FTC, opposed
 13 certiorari by noting that “[t]he court of appeals expressly assumed that the relevant question was
 14 whether [the defendant] had the status of a common carrier” and asserting that the Second Circuit
 15 was “clearly correct” in finding that the defendant “lacked that status.” Br. for the FTC in Opp.
 16 at 7, *Verity Int’l, Ltd. v. FTC*, No. 06-669 (U.S. filed Feb. 15, 2007), *available at*
 17 <http://www.justice.gov/osg/briefs/2006/0responses/2006-0669.resp.pdf>.

18 **III. Mobile Broadband Data Service Is Already Subject to FCC Regulation**

19 Even though mobile broadband data services are not currently treated as common carriage,
 20 they are still subject to FCC authority under Title III of the Communications Act and Section 706
 21 of the Telecommunications Act. Indeed, as already indicated, the FCC has opened an
 22 investigation into whether AT&T’s MBR program complies with its rules governing mobile data
 23 services, and has since indicated that it may file and adjudicate its own complaint against AT&T.
 24 The FTC’s attempt to assert jurisdiction here would thus create precisely the overlapping
 25 jurisdiction that Congress sought to avoid.

26 The FCC issued its *Open Internet Order* in December 2010, almost a full year before
 27 AT&T imposed its MBR program. AT&T relied on that *Order* in determining both the
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1 reasonableness of its network practices and the adequacy of its consumer disclosures. If these
 2 same network management practices and consumer disclosures are now to be subject to an FTC
 3 enforcement action, then wireless carriers would be exposed to just the kind of overlapping and
 4 potentially conflicting regulation that Congress sought to prevent with the Section 5 exemption.¹⁵
 5 Indeed, the potential for such overlapping and conflicting regulation has become especially acute
 6 in light of the imminent FCC proceeding to determine the compatibility of AT&T's MBR program
 7 with the Commission's Open Internet rules. The FTC is attempting to brand as "unfair" a program
 8 that AT&T believes was a permissible network management tool under the FCC's *Open Internet*
 9 *Order*. And the FTC is attempting to brand as "inadequate" disclosures that AT&T believes fully
 10 complied with the FCC's transparency requirements. The FCC has indicated that it will adjudicate
 11 these issues. As a prior Chairman of the FCC noted in commenting on this suit, "What the Federal
 12 Trade Commission has done, they're basically stepping onto the turf of the Federal
 13 Communications Commission."¹⁶

14 **IV. The FTC Cannot Rewrite the Statute To Expand Its Own Jurisdiction**

15 Finally, the FTC is well aware that Section 5, as drafted, withholds authority to regulate
 16 AT&T and other common carriers, and that is why it has repeatedly (though unsuccessfully)
 17 lobbied Congress to repeal the common-carrier exemption. In 2002, an FTC commissioner stated
 18 that the Section 5 exemption hinders its ability to regulate "business activities of
 19 telecommunications firms [that] have now expanded far beyond common carriage," such as

20 ¹⁵ The FCC has ample authority to ensure compliance with its regulations, including
 21 forfeiture penalties, *see 47 U.S.C. § 503(b)*, and it has not been reluctant to exercise such authority.
See generally Action for Children's Television v. FCC, 59 F.3d 1249, 1253 (D.C. Cir. 1995)
 22 (describing the FCC's "enforcement scheme," including 47 U.S.C. § 503, which "govern[s] all
 23 types of forfeitures"); *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 704 (1st Cir. 1977)
 24 (describing the FCC's "enforcement power" with respect to seeking "penalties for violations of
 25 FCC orders"); *Progressive Cellular III B-3 v. FCC*, 986 F.2d 546 (D.C. Cir. 1993) (Table) (noting
 the "FCC's rigorous enforcement of its hard-nosed rules, even where enforcement produces a harsh
 result") (internal quotation marks and citation omitted).

26 ¹⁶ Katy Bachman & Brooks Boliek, *FTC, FCC Jostling Over Telecom Turf*, Politico Pro
 27 (Oct. 30, 2014), available with registration at <http://www.politicopro.com/story/tech/?id=40104>;
see also Jeff Roberts, *Why a DC turf war may have played a part in the timing of the FTC's mobile
 data lawsuit against AT&T*, Gigaom (Oct. 28, 2014), <https://gigaom.com/2014/10/28/why-a-dc-turf-war-may-have-played-a-part-in-the-timing-of-the-ftcs-mobile-data-lawsuit-against-att>.

1 “Internet services,” and urged Congress to repeal the exemption so the agency would not be
 2 “forced to” “litigat[e] this issue” in court.¹⁷ In 2003, the FTC informed a House subcommittee
 3 that the exemption “hamper[s] the FTC’s oversight of the non-common-carrier activities” of
 4 common carriers.¹⁸ And in November 2011, FTC Commissioner J. Thomas Rosch acknowledged
 5 the strong arguments that “constrain[]” the agency’s jurisdiction over mobile data.¹⁹ The FCC’s
 6 decision not to classify data services as common carriage, Commissioner Rosch explained, “does
 7 not necessarily mean that the service is therefore subject to regulation by . . . the FTC.” “[W]e get
 8 our jurisdiction directly from Congress . . . not from another agency.”²⁰

9 As the FTC’s own unsuccessful pleas to Congress make plain, its proposed reading of
 10 Section 5 is foreclosed by the language of the statute. The FTC may not now seek to exercise the
 11 very jurisdiction that Congress has consistently declined to grant it. *See, e.g., City of Arlington v.*
 12 *FCC*, 133 S. Ct. 1863, 1874 (2013) (“Where Congress has established a clear line, the agency

13 ¹⁷ *FTC Reauthorization: Hearing Before the Subcomm. on Consumer Affairs, Foreign*

14 *Commerce and Tourism of the S. Comm. on Commerce, Science, and Transportation*, 107th Cong.

15 27-28 (2002) (statement of FTC Commissioner Sheila F. Anthony), available at

<http://www.gpo.gov/fdsys/pkg/CHRG-107shrg91729/pdf/CHRG-107shrg91729.pdf>.

16 ¹⁸ Prepared Statement of the Federal Trade Commission, Before the Subcomm. on

17 Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce, 2003 WL

21353573, at *19 (June 11, 2003).

18 ¹⁹ “Neutral on Internet Neutrality: Should There Be a Role for the Federal Trade

19 Commission?,” Remarks of J. Thomas Rosch, Commissioner, FTC, Before the Global Forum 2011:

20 Vision for the Digital Future 11-15 (Nov. 7, 2011), available at http://www.ftc.gov/sites/default/files/documents/public_statements/neutral-internet-neutrality-should-there-be-role-federal-trade-commission/111107globalforum.pdf.

21 ²⁰ *Id.* at 12. For this reason, the FTC’s assertion of jurisdiction fares no better even if the

22 FCC purports to support the FTC’s action. It is well established that one agency may not cede

23 jurisdiction to another. *See Textile & Apparel Grp., Am. Importers Ass’n v. FTC*, 410 F.2d 1052,

24 1057-58 (D.C. Cir. 1969) (footnote omitted) (“[T]he Commission’s argument runs afoul of the

25 general principle that authority committed to one agency should not be exercised by another. The

26 reason for this is that Congress delegates to one agency certain authority, perhaps because it feels

27 that agency is the most capable of exercising it. . . . Further, the political realities are often such that

28 Congress has chosen a particular agency with a particular orientation toward a problem; the proper

place for interested parties to get a different agency . . . to handle the job is back in Congress.”);

Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 132 F.3d 775, 783 (D.C. Cir. 1998)

(“[I]t would be unusual, if not unprecedented, for Congress to authorize the Board of Education to

delegate its own governing authority, its policymaking function, to another outside multi-member

body. That sort of delegation is inconsistent with the grant of overall authority to the Board of

Education . . . ”).

1 cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no
 2 further than the ambiguity will fairly allow.”); *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S.
 3 355, 374-75 (1986) (“An agency may not confer power upon itself. To permit an agency to
 4 expand its power in the face of a congressional limitation on its jurisdiction would be to grant to
 5 the agency power to override Congress. This we are both unwilling and unable to do.”); *American
 6 Bankers Ass’n v. SEC*, 804 F.2d 739, 754-55 (D.C. Cir. 1986) (“The whole point of the bank
 7 exclusion clauses in the definitions of ‘broker’ and ‘dealer’ is to place banks outside the broker-
 8 dealer jurisdiction of the SEC and leave them to the jurisdiction of banking regulators alone. The
 9 SEC cannot use its definitional authority to expand its own jurisdiction and to invade the
 10 jurisdiction of other agencies, including the Board of Governors.”).

11 **CONCLUSION**

12 For the reasons set forth above, AT&T respectfully requests that the Court dismiss this
 13 action pursuant to Federal Rule of Civil Procedure 12(b)(1).

14 Dated: January 5, 2015

Respectfully submitted,

15 KELLOGG, HUBER, HANSEN, TODD,
 16 EVANS & FIGEL, P.L.L.C.

17 By: /s/ Michael K. Kellogg
 Michael K. Kellogg

18 Attorney for Defendant
 19 AT&T Mobility, LLC

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